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### Radical Restructuring of Environmental Policy to Preserve Biodiversity in Southern Africa: Malawi at the Crossroads

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# RADICAL RESTRUCTURING OF ENVIRONMENTAL POLICY TO PRESERVE BIODIVERSITY IN SOUTHERN AFRICA: MALAWI AT THE CROSSROADS

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## INTRODUCTION

Self-described as "the warm heart of Africa," Malawi is a small, beautiful, and landlocked country in south Central Africa. A long, narrow nation, sitting astride the Great Rift Valley of Eastern Africa, it wrestles with an array of daunting environmental dilemmas. In response, Malawian government officials, donor organization representatives, and Non-Governmental Organization (NGO) representatives are discussing, developing, and implementing solutions. Thus, this tiny country provides a particularly useful environmental policy case study because of the seemingly intractable nature of its problems, which it shares with many other countries, and the hopeful and collaborative spirit with which government and donor organizations are seeking to craft solutions.

Malawi is also particularly significant as a site for such study due to its role as the lead country in natural resources policy development for the regional group,<sup>1</sup> the Southern African Development Community (SADC),<sup>2</sup> situated in a region rich in unique flora and fauna. Malawi's Director of the Department of National Parks and Wildlife is the SADC coordinator for this sector of the region's agenda. Furthermore, the Director of Malawi's National Herbarium was one of

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<sup>1</sup> The Southern African Development Community's (SADC) Fisheries, Forestry and Wildlife Programmes are coordinated by Malawi. SOUTHERN AFRICAN DEVELOPMENT COORDINATION CONFERENCE: A HANDBOOK 14 (1988). *See also* ESTABLISHMENT OF A REGIONAL WILDLIFE CONSERVATION EDUCATION UNIT FOR THE SOUTH AFRICAN DEVELOPMENT COMMUNITY: REPORT ON A SADC REGIONAL WORKSHOP HELD IN BLANTYRE, MALAWI, SADC DELEGATES LIST, App. 3 (1995). The name of the organization was changed to "Southern African Development Community" in 1994. *Id.*

<sup>2</sup> The members of SADC are: Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

the negotiators of the Biodiversity Convention which, in contrast to the case of the United States, has been ratified by Malawi.<sup>3</sup> These facts suggest a greater interest and sense of urgency in Malawi than in other countries with respect to addressing environmental problems.

This article will profile the country, sketch out its environmental challenges, and then lay out and evaluate policy and process solutions recently adopted or currently under consideration. Given the significant changes in policy and promising preliminary results described here, it is hoped that this analysis will serve as a resource to environmental policy makers in many contexts.

### I. MALAWI COUNTRY PROFILE

Listed among the poorest countries on Earth,<sup>4</sup> Malawi is a developing nation with a rapidly growing population. A variety of statistics paint a revealing picture. With an annual growth rate estimated at 3.2 percent,<sup>5</sup> among the highest in the world, Malawi ranks near the top in population density in Africa.<sup>6</sup> It is estimated that at this rate, the population will climb to 12 million by the year 2000<sup>7</sup> and 16 million by 2008.<sup>8</sup> Gauged at 43 persons per square kilometer in 1966, a 1992 demographic survey estimated that density would climb to 100 by 1994.<sup>9</sup> The current actual number presumably will be determined by the 1997 national census.

Other telling statistics show that overall only three percent of Malawi households have access to electricity.<sup>10</sup> Moreover, over one half of the population obtain their water from sources considered unsafe (i.e., unprotected wells or polluted natural sources).<sup>11</sup> A mere 33 percent have radios in working condition, while only 41 percent of men

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<sup>3</sup> Dept. of Research and Environmental Affairs, National Environmental Action Plan, Vol. 1: The Action Plan 2 (1994) [hereinafter NEAP].

<sup>4</sup> *Human Development Report*, United Nations Development Programme, at 179 (1995).

<sup>5</sup> REPUBLIC OF MALAWI NATIONAL STATISTICAL OFFICE, MALAWI DEMOGRAPHIC AND HEALTH SURVEY 2 (1992) (hereinafter SURVEY).

<sup>6</sup> KUTEZA TSOGOLO, UNITED NATIONS POPULATION FUND IN MALAWI, SAFEGUARDING THE FUTURE 6 (1994).

<sup>7</sup> DEPARTMENT OF ECONOMIC PLANNING AND DEVELOPMENT, OFFICE OF THE PRESIDENT AND CABINET, GOVERNMENT OF THE REPUBLIC OF MALAWI, NATIONAL POPULATION POLICY 3 (1994).

<sup>8</sup> Ezekiel Kalipeni, *Population growth and environmental degradation in Malawi*, 22 AFRICA INSIGHT 273 (1992).

<sup>9</sup> See SURVEY, *supra* note 5, at 3.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 12.

and 19 percent of women read a newspaper at least once a week.<sup>12</sup> These latter statistics evidence the difficulty inherent in trying to communicate with the public about issues of concern in Malawi, such as the deteriorating environment, family planning, and AIDS. Like much of Sub-Saharan Africa, the HIV-positive rate is very high. The United Nations Children's Emergency Fund (UNICEF) estimates that by the turn of the century some 800,000 children will be orphaned by the AIDS epidemic.<sup>13</sup> An even greater health threat in Malawi is malaria. While specific data are hard to come by, it is estimated that this mosquito-borne disease is responsible for one third of pediatric hospital admissions and kills one third of the children admitted for its treatment.<sup>14</sup>

It is further estimated that roughly 50 percent of Malawi's population is fifteen years of age or younger.<sup>15</sup> Illiteracy is the norm in a country where thirty percent of males and 48 percent of females have never attended school.<sup>16</sup> A mere six percent of males and two percent of females spend any amount of time in secondary schools.<sup>17</sup> Malawi's one university, the University of Malawi, accommodates a tiny number of students on two campuses, Bunda College of Agriculture in Lilongwe, and Chancellor College in Zomba. Unemployment is also a severe problem. Secondary school graduates in particular, but also those holding university degrees, have difficulty securing jobs due to the slow growth of the country's fledgling economy.<sup>18</sup>

The country is divided into three geographical regions (North, Central and South) and 24 districts.<sup>19</sup> Spectacular escarpments, plateaux and high mountains rise above the floor of the valley containing Lake Malawi. Altitudes range from just above sea level in the south of the valley to 3002 meters at the tallest peak in Central Africa, Mulanje Mountain,<sup>20</sup> located in the Central Region. Most Malawians live in the

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<sup>12</sup> *Id.* at 17.

<sup>13</sup> Patricia Somanje, *The Malawi Child: What Future Does He Have?*, MALAWI NEWS, June 15, 1996, at 10.

<sup>14</sup> J.J. Wirima, *A Nation-wide Malaria Knowledge, Attitudes and Practices Survey: Introduction*, 1 TROP MED PARASITOL 52-53 (1994).

<sup>15</sup> See Tsogolo, *supra* note 6, at 3.

<sup>16</sup> See SURVEY, *supra* note 5, at 16. It should be noted, however, that shortly after his election, President Muluzi declared that Malawi would provide free primary education to all of its citizens. The country is now in the early stages of implementing that decision.

<sup>17</sup> *Id.*

<sup>18</sup> Since official records documenting the extent of this problem are not kept, reports of teachers, college faculty and other knowledgeable observers are relied upon.

<sup>19</sup> JUDY CARTER, MALAWI WILDLIFE, PARKS AND RESERVES 1 (1987).

<sup>20</sup> *Id.*

Central and Southern Regions, leaving the Northern Region relatively sparsely populated. In 1987, population density was 125 persons per square kilometer in the South, 87 in the Central, and 34 in the North. The 1997 census data should show that these ratios remain unchanged.

More than 20 percent of the country is taken up with lakes and rivers.<sup>21</sup> Lake Malawi, one of the largest lakes on the planet, and the world's most diverse lake,<sup>22</sup> accounts for nearly 20 percent of the country's territory. The lakeshore is shared with Mozambique and Tanzania. Other significant bodies of water include the Shire River and Lakes Malombe, Chilwa, and Chiuta. Chilwa and Chiuta both sit on the Mozambican border. The international dimensions of resource ownership thus introduce yet another complexity in natural resource management that is beyond the scope of this article. With the exception of the Shire, most rivers and streams flow only during and shortly after the rainy season, November through April, and are dry beds during most of the dry season.<sup>23</sup>

In addition to providing employment for thousands of people,<sup>24</sup> Malawi's fisheries provide 70 percent of the dietary animal protein for its citizens.<sup>25</sup> This places fish stocks among the most significant of the country's resources. While productivity has dramatically declined in Lake Chilwa (which nearly dried up in 1995) and Lake Malombe,<sup>26</sup> the state of the stocks in Malawi's waters is subject to debate. Damage to the stocks appears to be occurring.<sup>27</sup> As yields from Lake Malombe shrink dramatically,<sup>28</sup> Lake Malawi's fishery continues to provide good yields, but perhaps of smaller and younger fish, with a reduced catch

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<sup>21</sup> NEAP, *supra* note 3, at 1.

<sup>22</sup> See Carter, *supra* note 19, at 3.

<sup>23</sup> *Id.*

<sup>24</sup> It is estimated that 200,000-250,000 persons are involved in the industry. Bill Derman et al., *Socioeconomic Diversity Among Lake Malawi's Small-Scale Fishers: Implications for Biological Diversity and Fisheries Management*, 1994 ANNUAL MEETINGS OF THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE 1 (1994).

<sup>25</sup> See NEAP, *supra* note 3, at 22.

<sup>26</sup> S.B. ALIMOSO AND D. TWEDDLE, FISHERIES DEPT., SEINE NET FISHERIES OF LAKE MALOMBE, FISHERIES BULLETIN NO. 25 1 (1995).

<sup>27</sup> Certainly anecdotal reports of long time fishers suggest that some species have become rare, and size of fish caught is generally smaller than in the past. Lake Malombe once had a large annual chambo catch, but it is regarded as virtually depleted at this time.

<sup>28</sup> Citing declines in Kambuzi catches from 5,000 tons to less than 2,000 in the 1980s, it is stated that the L. Malombe fishery is in danger of collapse. DENNIS TWEDDLE, TRADITIONAL FISHERIES ASSESSMENT PROJECT: A SUMMARY OF THE FINDINGS AND RECOMMENDATIONS 1 (1991)(undated report of the Senior Research Officer, Monkey Bay Research Station, presented at a meeting of Senior Fisheries Officers).

per effort ratio.<sup>29</sup> A variety of sources suggest that the stocks are in a severe and dangerous decline.<sup>30</sup> These sources include the anecdotal observations of local fishers and a U.S. ichthyologist who has conducted research at Lake Malawi for more than a decade.<sup>31</sup>

Owing primarily to a lack of large stores of extractable resources, large numbers of citizens of colonial powers did not settle and build substantial urban centers in Malawi as they did in neighboring countries. Thus, nearly ninety percent of Malawi's population lives in rural areas,<sup>32</sup> depending on agriculture and fishing to meet basic needs (and produce profit in times of good harvest).

As a result of the press of the human population, agricultural land is at a premium. Some expatriates, along with the past president of more than thirty years (and some of his close associates) acquired more than ten percent of the country's most productive land for private estate farming<sup>33</sup> where they grow primarily tea, coffee, and tobacco, the country's largest export commodities.<sup>34</sup> As a result of this reservation of prime land for estates, many village farmers have been pushed onto more marginal lands that are unsuitable for rainfed agriculture and that are prone to soil erosion. With no viable alternatives, these farmers are also moving into protected areas such as parks and reserves.<sup>35</sup>

It is estimated that 46% of Malawi's land is unfit for farming, leaving 54% of the land available.<sup>36</sup> When 10% is deducted for national parks and game reserves, 8% for forest reserves, and 10% for the estate

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<sup>29</sup> D. Tweddle, *Analysis of Catch and Effort Data for the Commercial Trawl Fisheries of Lake Malawi*, in PROCEEDINGS OF THE FISHERIES RESEARCH SYMPOSIUM, NOVEMBER 1994, FISHERIES BULLETIN No. 33 (1995).

<sup>30</sup> N.P. Van Zalinga, et al., *Preliminary Note on the Decline of Chambo Catches in Lake Malombe*, Field Document of the GOM/FAO/UNDP Project, DP/MLW/86/013 (1991); see also Tweddle, *supra* note 26 (discussing Malawi's fishery, sector by sector, indicating serious declines in significant species in all heavily fished areas from southern Lake Malawi to Lake Malombe, covering all of Malawi's most productive fishing areas). A recent news article reflects similar concerns, stating that "stocks in Malawi's water bodies are declining at an alarming rate..." and "stocks are declining at an average of 770 tonnes of fish per year...". *Fish Industry Under Threat in Malawi*, DAILY TIMES, Feb. 20, 1996, at 10.

<sup>31</sup> Jay Stauffer, Ph.D., Lecture at Michigan State University (October 23, 1996). Professor Stauffer has spent more than a decade conducting research on the fish of Lake Malawi.

<sup>32</sup> The 1987 census revealed that 89 percent of Malawians reside in rural areas. *Supra* note 7, at 5.

<sup>33</sup> AFRICA WATCH, WHERE SILENCE RULES: THE SUPPRESSION OF DISSENT IN MALAWI 18-20 (1990).

<sup>34</sup> NEAP, *supra* note 3, at 30; J.A. ESCHWEILER, MALAWI LAND USE ISSUES 12-14 (1993) (Consultant's report prepared for the World Bank).

<sup>35</sup> NEAP, *supra* note 3.

<sup>36</sup> ESCHWEILER, *supra* note 34, at i-ii.

sector, less than 26% remains to grow food for the population.<sup>37</sup> Indeed, in the National Environmental Action Plan (NEAP) it is estimated that almost all of the land most suitable for traditional methods of rainfed cultivation (31% of Malawi's total land area) is now being used for agriculture, including estates.<sup>38</sup>

Since gaining independence in 1964, Malawi has received large annual sums of aid money from many sources, including the U.S. and British governments, the World Bank, and a number of U.N. agencies.<sup>39</sup> The importance of a continued flow of aid funds to the Malawi economy cannot be underestimated, and the leverage in policy and project development and implementation gained by donor organizations is considerable.

## II. MALAWI'S ENVIRONMENTAL DEGRADATION

In 1996 the Malawi government used 11 million as the estimated population figure, up from an estimated 737,000 persons in 1901.<sup>40</sup> The huge population increases of this century have led to the cultivation of virtually all arable land in the South and most in the Central Region. As noted in Malawi's recently adopted NEAP, deforestation and soil erosion are epidemic, and along with population growth and poverty, head the list of serious environmental threats.<sup>41</sup> These problems are driven primarily by the necessity to clear land for agriculture and to harvest wood, which provides 90 percent of the nation's energy needs for cooking and heating.<sup>42</sup> Little prospect exists for any reduction in use in this sector in the foreseeable future.

In light of the extreme urgency of the need to respond to the deforestation and soil erosion problems, and with a growing population pushing up demand, efforts are underway to launch and expand the Forestry Department and private tree plantations, and to encourage villagers to plant trees.<sup>43</sup> At this point in time, however, timber removal

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<sup>37</sup> *Id.*

<sup>38</sup> NEAP, *supra* note 3, at 14-15.

<sup>39</sup> A July, 1996 news article states that about 40 percent of Malawi's recurrent budget and 60 percent of its development budget come through foreign aid. George Ntonya, *Envoy Slams Govt. Crooks*, NATION, July 6, 1996, at 1.

<sup>40</sup> NEAP, *supra* note 3, at 23.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> MINISTRY OF NATURAL RESOURCES, NATIONAL FOREST POLICY OF MALAWI I (1996).

<sup>43</sup> DEPARTMENT OF FORESTRY, MALAWI: FORESTRY POLICY REVIEW, WORKING PAPER 8, INSTITUTIONS AND LEGISLATION 5, 18-19 (1994).

far exceeds tree planting.<sup>44</sup> Indeed, as anyone living near forested areas can attest, cut trees move steadily, relentlessly, everyday down the hillsides in logging trucks and, more commonly, one heavy log at a time on some person's head. More than 40 percent of Malawi's forests have met the axe.<sup>45</sup> An estimated 36 percent of the country's land area remained forested in 1993.<sup>46</sup> Currently the rate of national deforestation is pegged at 1 to 2.8 percent per year, depending on the area.<sup>47</sup>

As noted above, nearly one fifth of Malawi's land has been set aside in protected areas as game reserves, national parks and forest reserves. However, in what is called the "hard edge effect," Malawi's people live and cultivate gardens in areas that are immediately adjacent to (or even in) these areas.<sup>48</sup> This fact of life makes conservation of biological diversity particularly challenging. The proximity of local people to wildlife, which contrary to their historical, pre-colonial practices they have recently been forbidden from killing, results in a significant level of conflict and strife.<sup>49</sup>

A conglomeration of activities described in modern times as "poaching" is steadily driving wildlife and plant populations to extirpation and extinction.<sup>50</sup> Park management plans written in the early to mid-1980's, for example, cite the loss of animals such as the rhinoceros, the nyala and the puku.<sup>51</sup> For local people, the damage done to their gardens by elephants, hippos and other wildlife, for which parks inadequately provide habitat and food resources, is a life-threatening problem.<sup>52</sup> Prohibitions against taking animals without a license and

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<sup>44</sup> NEAP, *supra* note 3, at 44-45.

<sup>45</sup> ESCHWEILER, *supra* note 34, at 18-19.

<sup>46</sup> MINISTRY OF NATURAL RESOURCES, *supra* note 42, at 1; ESCHWEILER, *supra* note 34, at ii.

<sup>47</sup> NEAP, *supra* note 3.

<sup>48</sup> F. NAKAI, ENHANCING NATURAL RESOURCE MANAGEMENT AND SUSTAINABLE DEVELOPMENT THROUGH COMMUNITY PARTICIPATION IN MALAWI 18 (January 1997) (WORKING PAPER, PREPARED FOR MOREA AND UNDP). When the author met with Mr. Mathew Matemba, Director of National Parks & Wildlife, in 1996, he indicated that at least an eighth of Kasungu National Park, on the eastern side, had been lost to villages and cannot be reclaimed.

<sup>49</sup> 32 *Hippos Brutally Killed in Shire River*, DAILY TIMES, Feb. 27, 1996, at 6.

<sup>50</sup> NEAP, *supra* note 3, at 52.

<sup>51</sup> NEAP, *supra* note 3, at 52; JOHN CLARKE, DEPT. OF NATL. PARKS & WILDLIFE, PROTECTED AREAS MASTER PLAN FOR CENTRAL REGION, VOL. III (KASUNGU NATIONAL PARK, NKHOTAKOTA GAME RESERVE) (1983).

<sup>52</sup> *Rampaging Elephants Driven Back*, DAILY TIMES, May 5, 1996, at 3, cols. 1-3. The article describes an April 23 incident in which a herd of "stray" elephants left the Liwonde National Park, trampled 5 villagers to death and injured 2. It was rumored that the villagers had been taunting the elephant herd. *Id.*



without certain types of expensive hunting gear,<sup>53</sup> along with threats of enforcement established under the colonial regime, create a high level of animosity towards the animals who are perceived as vermin.

In addition to wishing to protect their vegetable gardens, the need of local people for food and fuelwood, cultural needs for animal products, and medical needs for herbs and other plants drives them to engage in what became categorized and punished as illegal activity under the colonial regime. While government resources (or political will) have never permitted a high degree of enforcement in the parks, reserves, or at the lakes,<sup>54</sup> tension and antagonism between local people and government agents are high as people struggle to survive in a crowded land with a rapidly shrinking natural resource base. Moreover, it is asserted by many persons with long experience in Malawi that corruption is a major factor in a regulatory setting in which government agencies are unable to cope with their work loads.<sup>55</sup>

Throughout the 1980's and until the 1995-96 rainy season, Malawi's environment was stressed by near-drought conditions.<sup>56</sup> In 1993-94, for example, rains that typically fall from November to March ended in December. In June, the landscape looked as it normally does in September, the usual end of the dry season. The water levels in all significant water bodies that are sources of fish (Lakes Malawi, Malombe, Chilwa, Chiuta, and the Shire River) dropped precipitously during that time. Indeed, by 1995 Lake Chilwa had all but completely dried up, as it has done periodically throughout recorded history, with Lakes Malombe and Chiuta in danger.<sup>57</sup> While they can be expected to refill and contain fish again in the future, in the short run, the loss of fish is devastating to the thousands of persons whose livelihoods come from fishing and to the millions who eat the fish they catch, process and sell. In addition, along with reducing fish habitat, the lowering of the Shire River threatens the ability of the Electricity Supply Commission of Malawi (ESCOM) to provide sufficient electricity through its main

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<sup>53</sup> The Game Act, Cap. 66:03; the Wild Birds Protection Act, Cap. 66:04; the Crocodiles Act, Cap. 66:06. The NPWA of 1992 contains licensing provisions (§ 48) and weapons restrictions (§ 67) which continue to limit local peoples' access to hunting.

<sup>54</sup> NEAP, *supra* note 3 at 51; Anne E. Ferguson et al., *The New Development Rhetoric and Lake Malawi*, 1 AFRICA 63, at 12 (1993) ("The lake is too large, the fishing people are too numerous and the funding is too limited for the Fisheries Department to police the lake.").

<sup>55</sup> See *infra* note 108 and accompanying text.

<sup>56</sup> Observations of the author who was in Malawi at that time.

<sup>57</sup> LAKE CHILWA: STUDIES OF CHANGE IN A TROPICAL ECOSYSTEM (Margaret Kalk, et al., eds., 1979); DECLINE AND RECOVERY OF A LAKE (Margaret Kalk ed., 1970).

hydro power facility, the primary source of electricity for the country.<sup>58</sup>

### III. 1994: DEMOCRACY TAKES ROOT

Also of great significance to governmental policy development in all sectors is Malawi's new democracy. As a result of heavy donor country pressure for democracy, threatening the continued flow of foreign assistance, the government was forced to stage multiparty elections. In 1992 President Hastings Kamuzu Banda<sup>59</sup> and the Malawi Congress Party agreed to put the question to the people, and in May of 1993, the people responded overwhelmingly to choose a multiparty system.<sup>60</sup> On May 17, 1994, after 31 years of the repressive reign<sup>61</sup> of the "Life President,"<sup>62</sup> a new president, Bakili Muluzi of the United Democratic Front, was elected.<sup>63</sup>

The new atmosphere of openness stands in stark contrast to the closed environment of the Banda years. After an initial optimism about possibilities for a more equitable and viable future for Malawi, however, cynicism is pervasive as government ministers grant themselves 300 percent salary increases at a time when villagers in many areas go hungry.<sup>64</sup> Nonetheless, in contrast to the colonial<sup>65</sup> and subsequent Banda years, where life seemed to unfold as an unchangeable matter of fate, people are beginning to believe that they can have an impact, and are speaking out.<sup>66</sup>

<sup>58</sup> Indeed, as a result of reduced level of the Shire River, the World Bank is proposing a large project to raise its level through the construction of a "barrage" which is in essence a huge number of boulders piled in a long line at the mouth of the river. The environmental impact assessment of the project is being conducted in 1996.

<sup>59</sup> For a detailed account of Banda's life and regime up to 1974, see PHILIP SHORT, BANDA (1974). Dr. Banda died in Johannesburg, South Africa on November 25, 1997, believed to be in his late nineties.

<sup>60</sup> For an articulate summary of the political history and new challenges currently confronting Malawi, see F.F. Kanyongolo, *State and Constitutionalism in Malawi, paper presented at SOCIAL CHANGE IN MALAWI SEMINAR* (June 21, 1996); Daniel N. Posner, *Malawi's New Dawn*, 1 J. OF DEMOCRACY, Vol. 6, 131-45 (1995).

<sup>61</sup> For an extensive description and analysis of the decades of repression during the Banda years, see AFRICA WATCH, *supra* note 33.

<sup>62</sup> A constitutional amendment was made to the Malawi Constitution in 1971, just before the first scheduled presidential election, making Banda "Life President of the Republic." SHORT, *supra* note 59, at 281.

<sup>63</sup> See *supra* note 60 and accompanying text.

<sup>64</sup> Gary Chirwa, *Salary Increase Unreasonable!*, DAILY TIMES, June 2, 1996, at 3.

<sup>65</sup> For a fascinating analysis of the colonial period in Malawi, see MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985).

<sup>66</sup> For example, in June 1996, school teachers who had not been paid for two months refused to work and took to the streets to demonstrate. Students from the University of Malawi, concerned about budget cuts marched on Sanjika Palace in Blantyre (where they were tear-gassed)

IV. ENVIRONMENTAL POLICIES AND PRACTICES BEGIN  
TO REFLECT PRINCIPLES OF SUSTAINABILITY  
AND BIODIVERSITY PRESERVATION

Written while Dr. Banda maintained his grip on power, Malawi's "Statement of Development Policies, 1987-1996," in chapters on Fisheries, Forestry, National Parks and Tourism, Water Resources and the Physical Environment, pinpointed many of the country's most pressing environmental problems.<sup>67</sup> Little was proposed in the short run to address these concerns, however, beyond reviewing and planning to rewrite policies and develop new programs.<sup>68</sup>

Presumably related to donor country project funding requirements as well as the impending election of a new national government, many laws were proposed for change as Malawi entered the decade of the 1990s. A new National Parks and Wildlife Act (NPWA) was enacted in 1992, taking effect in April, 1994.<sup>69</sup> It replaced a number of old game control laws<sup>70</sup> and, in a new approach, gave attention to ecosystem management through the concept of sustainable harvest and sustainable yield<sup>71</sup> and the need to preserve rare and endangered species<sup>72</sup> and biotic communities.<sup>73</sup> A "precursor" to the Biodiversity Convention, it reflects a new understanding of the value of biological diversity and the need to design policies that seek to preserve species and ecosystems.

The NPWA also brought into Malawi law for the first time the concept of environmental impact assessment, through a provision that allows "any person" to request a "wildlife impact assessment" when it is believed that some activity will have an adverse effect on wildlife.<sup>74</sup> The Act makes reference to management but fails to require planning even though the department had engaged in planning over at least the

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and the State House in Zomba (one of the president's alternate residences). A steady stream of critical news articles as well as public conversations in 1994 and even more in 1997 stood in dramatic contrast to polite silences and meaningful glances observed by the author in 1990.

<sup>67</sup> DEPARTMENT OF ECONOMIC PLANNING AND DEVELOPMENT, OFFICE OF THE PRESIDENT AND CABINET, GOVERNMENT OF MALAWI, STATEMENT OF DEVELOPMENT POLICIES 1987-96, (1987).

<sup>68</sup> *Id.*

<sup>69</sup> National Parks and Wildlife Act (1992) (Malawi).

<sup>70</sup> NPWA § 124(1) (repealed section), lists the Game Act, Wild Birds Protection Act, Crocodiles Act, and National Parks Act.

<sup>71</sup> NPWA § 39(b).

<sup>72</sup> *Id.* at § 3(1)(b).

<sup>73</sup> *Id.* at § 3(1)(c).

<sup>74</sup> *Id.* at § 23(1).

prior decade and a half.<sup>75</sup> It is expected that this omission will soon be addressed when the law is redrafted to fit within the new environmental framework described below. In this regard, a promising direction can be seen in the inclusion of planning as a mandate in the draft Fisheries Conservation and Management Act<sup>76</sup> and the changes in philosophical orientation in natural resources policy in Malawi in recent years. Thus, it is expected that the revision of the NPWA warranted by the new environmental framework law will contain such a provision.

Late in 1992, soon after the Earth Summit was held in June in Rio de Janeiro, Malawi began to develop its response to Agenda 21, the Summit conferees' plan for a sustainable future.<sup>77</sup> With strong encouragement from donor organizations, a National Environmental Action Plan (NEAP)<sup>78</sup> was formulated through a multistage process that involved numerous consultations held throughout the nation.<sup>79</sup> It was formally launched at the end of 1994,<sup>80</sup> setting the stage for its implementation through subsequent government action.

A second step was to draft and send to the President and Cabinet a National Environmental Policy. Reflecting the concerns and recommendations of the NEAP, such a document was submitted and received approval in February, 1996.<sup>81</sup> Thus, a foundation was laid for further legislative action in a variety of natural resources sectors.

#### V. PROMISING NATURAL RESOURCES MANAGEMENT IMPROVEMENT PROJECTS

In an effort to move the country forward, while new policy

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<sup>75</sup> In the early and mid-1980's, the Department of National Parks and Wildlife produced management plans for all major protected areas under its authority. But at that time, the policy referred to management but not to planning. DEPARTMENT OF NATIONAL PARKS AND WILDLIFE, PARKS AND WILDLIFE POLICY, PRINCIPAL MASTER PLAN FOR NATIONAL PARKS AND WILDLIFE MANAGEMENT, VOL. I OF THE MASTER PLANS, September, 1983.

<sup>76</sup> The Fisheries Conservation and Management Act 199, draft, § 7(a) (Malawi).

<sup>77</sup> Agenda 21 Action Plan, U.N. Doc. A/CONF.151/26, vols. I-IV (1992).

<sup>78</sup> For a complete discussion of the national environmental action plan process in Sub-Saharan Africa led by the World Bank, see FRANCOIS FALLOUX AND LEE M. TALBOT, CRISIS AND OPPORTUNITY: ENVIRONMENT AND DEVELOPMENT IN AFRICA (1993).

<sup>79</sup> Chapter two of the NEAP spells out in detail the nature of the consultation process that was used in developing the NEAP document. NEAP, *supra* note 3, at 5-9.

<sup>80</sup> NEAP, *supra* note 3.

<sup>81</sup> The 35 page statement of governmental environmental policy identifies policy goals and guiding principles, macro-economic policy issues and instruments, cross-sectoral policy objectives, principles and strategies, and sectoral policy objectives, principles and strategies. Its overall policy goal is the promotion of sustainable social and economic development through the sound management of the environment in the country. MINISTRY OF RESEARCH & ENVIRONMENTAL AFFAIRS, NATIONAL ENVIRONMENTAL POLICY § 2.1 (1996).

directions were being considered and discussed, collaborative projects involving government, donors and NGOs were developed and implemented. In sharp contrast to the recently-ended, repressive, post-colonial Banda epoch described above, it seems that a greater understanding of the degree to which "everything is connected to everything else" drives government and donor efforts to bring about positive change in conservation and environmental management.<sup>82</sup> "Sustainability," the aptly coined buzzword that especially gained currency as a result of the 1992 Earth Summit, also seems to be a driving force in policy creation and implementation. It is hoped both in the newly created Ministry of Research and Environmental Affairs<sup>83</sup> (MOREA) and in the donor community that this kind of proactive thinking will guide and bring about appropriate policy development to permit Malawi to meet its resource needs on a sustainable basis.

Activities now underway in Malawi that demonstrate this spirit include a collaborative fisheries project, the Participatory Fisheries Management Project (PFMP), involving the Fisheries Department and several donors.<sup>84</sup> With funding from the World Bank, the Overseas Development Administration, the United Nations Development Programme (UNDP), the U.N. Food and Agriculture Organization, and a German donor organization, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), the program has achieved promising results thus far.

For its part, GTZ's Malawi-German Fisheries and Aquaculture Development Project (MAGFAD) works with local communities to create a sustainable system at Lake Malombe through extension education which emphasizes sustainable fisheries practices (including use of appropriate gear types and the state of fish stocks information), improved fish processing, and forestry, to provide the wood needed for processing, cooking and boat construction.<sup>85</sup> The success of the project to date led the MAGFAD team leader to propose that GTZ fund an

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<sup>82</sup> Actually, it should be acknowledged that movement towards addressing heightened concerns about the environment through plans for sustainable natural resource management is a global trend. Failure to respond quickly to these issues was a widespread global problem, not simply a weakness of the repressive Banda regime.

<sup>83</sup> In 1995, the Department of Research and Environmental Affairs, attached to the President's office, was converted to a ministry. This was hoped to signal a greater emphasis on environmental concerns. *But see infra* note 177.

<sup>84</sup> FISHERIES DEPARTMENT, PARTICIPATORY FISHERIES MANAGEMENT PROGRAMME: LAKE MALOMBE AND UPPER SHIRE RIVER, STATUS REPORT 2 (1994).

<sup>85</sup> G.O. WALTER, DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT (GTZ) GMBH, REPORT ON THE PROJECT PROGRESS REVIEW WITH THE MALAWI-GERMAN FISHERIES AND AQUACULTURE DEVELOPMENT PROJECT (1995).

expanded project that would include all of Lake Malawi,<sup>86</sup> an enormous undertaking considering the size of the lake and the fishing industry there.

Complementing this effort, a UNDP project on Alternative Income Generation seeks to find, evaluate, and promote sustainable alternatives to fishing to reduce pressure on the fisheries.<sup>87</sup> So far, however, in fishing communities it appears that little economic activity exists outside of the fishing industry. A study conducted by a Malawian researcher shows that the "alternative" economic activities to which fishers turn, such as fish trading, are almost exclusively based in the fishing industry.<sup>88</sup>

The PFMP also promotes local fishing community participation in management of fisheries.<sup>89</sup> Within the Fisheries Department enthusiasm exists for this new management approach. Its emphasis on community education through extension messages about good fishing practices and the rationales behind some regulations, such as closed seasons, are regarded as extremely helpful.<sup>90</sup> It is hoped that the extension education component of the project will result in more enlightened fishers who will participate in management planning and implementation and play a vital role in creating sustainable fisheries, a key component of Malawi's biological diversity and economy.

A pilot community management project on Lake Malombe,<sup>91</sup> a resource which is under severe fishing pressure, is a key, closely watched project. Facing the realities of a tiny staff and budget, on the one hand, and a huge management task, on the other, Fisheries Department staff are cautiously and optimistically participating in and monitoring this project. In brief, Beach Village Committees (BVCs)

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<sup>86</sup> Interviews with Dr. Uwe Scholtz, Team Leader, MAGFAD project (Apr.-May 1996).

<sup>87</sup> J.F. DORSEY, JR., FOOD AND AGRICULTURE ORGANIZATION, INCOME GENERATING ACTIVITIES REPORT: PRELIMINARY CONSULTANCY REPORT, draft (1995) (on file with J. NAT. RESOURCES & ENVTL. L.).

<sup>88</sup> A study of the fishing communities in Mangoch for World Vision International revealed that despite international donors' promotion and hopes for increased income-earning activity outside of the fishing industry, in fact almost all non-fishing activity was fishing-related, such as fish processing and fish trading. Interviews with Professor Wiseman Chijere Chirwa, Head, Dept. of History, Chancellor College, University of Malawi (Mar.-Apr. 1996).

<sup>89</sup> See *supra* note 84.

<sup>90</sup> S.J.R. Bland & S.J. Donda, *Common Property and Poverty: Fisheries Co-Management in Malawi*, Paper presented to the International Association for the Study of Common Property, 5th Common Property Conference: Reinventing the Commons, Bodo, Norway (May 24-28), in FISHERIES BULLETIN NO. 30, (Fisheries Dept., Ministry of Natural Resources, 1995).

<sup>91</sup> *Id.*

are formed in each fishing village.<sup>92</sup> The BVCs cooperate and work with the Fisheries Department to develop regulations and to report violations, where efforts to persuade offenders to change their behavior have failed.<sup>93</sup> Initiating BVC activity requires additional commitment of Department staff resources, as BVC members need training in working in a committee structure, developing agendas, and maintaining records, among other tasks. Staff are optimistic, however, that these short run investments will pay off in the future, and BVCs will operate relatively independently<sup>94</sup> as partners in management.

#### VI. THE ENVIRONMENT MANAGEMENT ACT: THE DAWN OF A NEW ERA?

At the same time that natural resources management projects were moving forward, as a critical step in the process of advancing aggressively to address the country's myriad environmental problems and its desperate need for a clear and achievable policy on environment, the Environment Management Bill, recommended in the NEAP,<sup>95</sup> was introduced in Parliament in March, 1996.<sup>96</sup> On the last working day in June, during the June-July parliamentary session, it passed and became the Environment Management Act (EMA).<sup>97</sup> Support and enthusiasm for the bill were strong during the "debate" in the National Assembly where the more than eight Members of Parliament who spoke stated their unqualified support for the proposed law.<sup>98</sup> One MP noted with particular vigor and clarity that, "[t]he environment can do without man, but man cannot survive without the environment."<sup>99</sup>

Broadly stated, the EMA sets forth a policy of coordinated natural resources management, an approach essential to biodiversity preservation. Within the overarching framework of the Act, sectoral planning, management and enforcement will be coordinated by MOREA to implement the NEAP and district level environmental

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<sup>92</sup> See *supra* note 90 at 11.

<sup>93</sup> S.J.R. BLAND & S.J. DONDA, *MANAGEMENT INITIATIVES FOR THE FISHERIES OF MALAWI* 10-12 (1994).

<sup>94</sup> Information gained in a number of conversations with Mr. B.F.R. Mtika, U.N.D.P. National Extension Expert, Mangochi District Fisheries Office. Temporarily on loan from the Fisheries Department to the project, Mr. Mtika works with and assists the BVCs.

<sup>95</sup> NEAP, *supra* note 3, at 93.

<sup>96</sup> Environment Management Bill, B. No. 23 (1996) (Malawi).

<sup>97</sup> Environment Management Act, Malawi Gazette Supp., No. 7C (Aug. 16, 1996).

<sup>98</sup> Author's notes taken while in attendance at the 1996 June-July parliamentary session.

<sup>99</sup> MP from Ncheu West, speech (June 26, 1996).

action plans.<sup>100</sup> Thus, active engagement at both the national and district levels is evidently envisioned in the new statute. The key particulars of the new law are discussed below.

Overall, it can be seen that the principal goals of the EMA are to manage the environment on a sustainable basis, to create individual rights and duties regarding a clean and healthy environment, and to achieve a maximally effective and efficient management approach rooted in coordinated action. In a change of direction for Malawi, the law creates in every person "the right to a clean and healthy environment."<sup>101</sup> Concomitantly, every person is given the responsibility to protect the environment and manage it sustainably.<sup>102</sup>

As originally proposed the bill contained the right of "any person" to sue without the need to establish standing.<sup>103</sup> This proposal was a truly radical departure from earlier policies, and created the potential for the public to share with government environmental protection enforcement responsibility. Unfortunately for the proponents of this provision, in the waning hours of the debate in the National Assembly, it was learned that at a joint meeting of the Cabinet Committee on Environment and the Cabinet Committee on Legal Affairs, from which environmental legislation introduced by the executive branch<sup>104</sup> had to receive approval before Parliament could act on it, the right to sue provision was withdrawn.<sup>105</sup> It was rumored that concerns raised by senior level government lawyers involved in the process resulted in this excision. Not surprisingly, their concerns were reported to rest on the usual reason that a sea change of this magnitude might be rejected. It apparently was argued that the "floodgates of litigation" would open, overwhelming the courts with cases, along with concern about the consequences of allowing enforcement to move even partially outside of government control. These fears seem to have won the day. Those familiar with the Malawi courts' current level of litigation and the resources available for litigation, however, question the reality of these fears.

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<sup>100</sup> Environment Management Act (E.M.A.), §9(1) (1996) (Malawi).

<sup>101</sup> E.M.A., § 5 (1996).

<sup>102</sup> E.M.A., § 3 (1) (1996).

<sup>103</sup> E.M.A., § 5 (2)-(3) (1996).

<sup>104</sup> In Malawi's system, both ministers and members of Parliament may propose legislation. CONST. OF THE REPUBLIC OF MALAWI, Ch. I, § 7, Ch. VI, § 66, Ch. VI, § 70, & Ch. VIII, § 96.

<sup>105</sup> Environment Management Bill (1996), *as amended by* Notice of Committee Stage Amendments, cl. 5(b). (These two pages of amendments were distributed on the day the vote was taken.)



Loss of the standing provision means, of course, that the status quo prevails in which the government remains solely in charge of enforcement of environmental regulations. Knowledgeable persons are skeptical about continuing this arrangement. Many individuals who have worked in this field in Malawi for more than a short period observe that government enforcement of environmental regulations is extremely limited and viewed with great hostility by local people.<sup>106</sup> For example, the magistrate for Mangochi, the busiest fishing area on Lake Malawi, where literally thousands of persons are engaged in the fishing industry, reported in 1994 that in the recent one year period he had seen the Fisheries Department press for prosecution in just three cases.<sup>107</sup> In his opinion, the lack of prosecutions was not based on a lack of violations. Moreover, anecdotal evidence suggests that a high degree of hostility exists between government and fishing communities based on perceived official corruption.<sup>108</sup> If these reports are true, among other reasons for this behavior, one can cite the extremely low salaries of many department staff as a main factor in this problem. Front line personnel, such as "fish scouts" who earn approximately \$33 per month,<sup>109</sup> receive an amount which is insufficient to support the scout and his or her family.

Along with corruption, it should be noted that many natural resources staff have held their positions for several years, stretching back in time into the Banda administration. It is reported by a number of persons working in Malawi over the last one or two decades, both expatriates and Malawians, that such persons often developed a "don't rock the boat" mentality, resulting in a pronounced lack of vigor when it came to law enforcement. That mentality apparently persists. For example, it was reported in 1996 that the violation of fishing regulations by a commercial operation was a source of concern to small scale operators who expressed frustration at apparent discriminatory treatment.<sup>110</sup> They were prohibited from fishing in the productive Upper Shire River, while a pair trawler operation did so. A Fisheries

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<sup>106</sup> See, e.g., NEAP § 4.3.2.6, *supra* note 3 at 45. See also NEAP § 4.3.4.4 at 50-51.

<sup>107</sup> Interview with Mr. C. Kavamugu, Resident Magistrate, in Mangochi (June 24, 1994).

<sup>108</sup> No studies of governmental corruption have been made. Evidence of corruption rests in anecdotal accounts. See, e.g., Ntonya, *supra* note 39, and Chide, *U.S. Not Amused*, MALAWI NEWS, July 6, 1996, at 1, cols. 4-6 (reporting concern expressed by the U.S. Ambassador to Malawi, Peter Chaveas, regarding government corruption).

<sup>109</sup> Interview with Mr. Alfred Nkoza, fish scout, at Lake Chiuta (May 25, 1996).

<sup>110</sup> Fisheries Department extension personnel, Report at a meeting at the Mangochi Fisheries Office (Feb. 1996).

Department staffer observed that the lack of action against the commercial fishing enterprise might be rooted in the close personal relationship between the business owner and high government officials.<sup>111</sup> In this connection, he was of the opinion that a statute that permitted members of the public to sue the government would be very helpful.

## VII. EMA: COORDINATION FUNCTION

Under the EMA framework, coordination of natural resources management will be achieved through a variety of mechanisms. The "minister" (unstated, but presumably the minister of MOREA or any successor ministry) is required to consult with "lead agencies" to achieve the Act's goals.<sup>112</sup> The logic here is two-fold. It seems apparent that this language reassures sectoral ministries and departments that their territory is not being encroached upon, reducing their natural resistance to the creation of MOREA and the passage of the EMA. Second, of course, is the fact that coordination can most effectively happen through the development of a network with which the coordinator is constantly linked and interacting. For this reason, MOREA and donor representatives developed two committees, the National Steering Committee and the National Legal Task Force, and a sectoral network to assist in this effort.<sup>113</sup>

A National Steering Committee, composed of representatives from the relevant ministries and donor organizations, collaborates to coordinate the planning effort driving the updating and harmonizing of legislation, policies and sectoral ministry staff roles.<sup>114</sup> A National Legal Task Force which includes lawyers from the relevant sectoral organizations was created to stimulate interaction among those who will be active in drafting new sectoral legislation, in furtherance of the NEAP, the National Environmental Policy and the EMA.<sup>115</sup> Finally, "environmental focal points" were established in all relevant sectoral organizations to establish within each one a single individual or small group that could participate on an ongoing basis in coordinating

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<sup>111</sup> *Id.*

<sup>112</sup> Environmental Management Act, § 8 (1) (1996).

<sup>113</sup> The National Steering Committee and the National Legal Task Force along with their respective terms of reference are described in *Malawi Workplan, Malawi Environmental Law and Institutions Programme* at 1-16, U.N. Doc. No. UNEP/NDP/RAF/92/015 (1996) [hereinafter *Malawi Workplan*].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

activities as well as environmental policy development and implementation in their own agencies.<sup>116</sup>

An additional coordination mechanism mandated by the EMA establishes an advisory body, the National Council for the Environment, on which sit the principal secretaries (the top level civil servant in each ministry) of all government ministries.<sup>117</sup> Section 12 spells out the duties of the Council, which include advising the Minister "on all matters and issues affecting the protection and management of the environment and the conservation and sustainable utilization of natural resources"<sup>118</sup> and recommending "measures necessary for the harmonization of activities, plans and policies of lead agencies and non-governmental organizations."<sup>119</sup> Thus, coordination is established at multiple operational levels. It is hoped that through this interlinked system, coordination and collaboration will become a part of the fabric of government life.

Coordination at the policy level is already underway. In 1995, MOREA developed the Malawi Environmental Support Programme (ESP) aimed at creating systems and programs to link, integrate and support sectoral environmental activities.<sup>120</sup> The ESP programme document identifies the institutions and environmental sectors in which change is needed. It ties agencies to problems by outlining which organization will undertake planning, project development and implementation for specified areas.<sup>121</sup> Resources from the Natural Resource Management and Environmental Support (NATURE) Program of the United States Agency for International Development (USAID)<sup>122</sup> and the Fifth Country and Capacity 21 Programmes of the United Nations Development Programme (UNDP)<sup>123</sup> provide funding and other support for the ESP. Donors and ministry staff work together

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<sup>116</sup> *Malawi Workplan*, *supra* note 113 (a detailed description of the approach contemplated by the Government of Malawi and the donor representatives was provided to the author by Sean Southey, Environmental Programme Officer, UNDP, Malawi, and Ernest Makawa, Legal Affairs Officer, Ministry of Research and Environmental Affairs).

<sup>117</sup> Environmental Management Act §10 (c) (1996) (Malawi).

<sup>118</sup> E.M.A. § 12 (a) (1996).

<sup>119</sup> E.M.A. § 12 (c) (1996).

<sup>120</sup> Ministry of Research and Environmental Affairs, the Malawi Environmental Support Programme at 1-77 (1995).

<sup>121</sup> *Id.*

<sup>122</sup> Program Grant Agreement for the Natural Resource Management and Environmental Support (NATURE) Program, Sept. 30, 1995, U.S.-Malawi [hereinafter U.S.-Malawi Agreement].

<sup>123</sup> NAKAI, *supra* note 48, at 41,43. In addition to the provision of funds, the donors support staff specific positions such as the Fisheries Department extension officer in charge of the Lake Malombe community participation project and the attorney in the Ministry of Research and Environmental Affairs. *Id.*

to rethink and rewrite policies, statutes and regulations and to rethink their institutional roles in the new framework. To increase efficiency in this transformation process, financial incentives were built into the process. As the Malawi government completes a specified set of tasks, donor funding is released in installments for the government's use.<sup>124</sup>

While the Environment Management Act sets broad objectives in terms of the environment and natural resources in general, it also targets specific critical areas for planning and enforcement. These areas are: biological diversity,<sup>125</sup> including genetic resources,<sup>126</sup> waste management in the country,<sup>127</sup> transport of waste,<sup>128</sup> pesticides and hazardous substances,<sup>129</sup> protection of the ozone layer<sup>130</sup> and pollution discharge.<sup>131</sup> The targeted areas are highly relevant to preservation of biological diversity. First, diversity and genetic resources are specifically mentioned. Though not a complete array of what would seem to be the critical areas,<sup>132</sup> it is clear that the other listed areas focus on maintaining suitable habitats that are free of toxics. The remaining numerous issues requiring attention are left to the legislation addressing sectoral organizations, such as the Department of Lands and the Department of National Parks and Wildlife.<sup>133</sup>

#### VIII. ENVIRONMENTAL IMPACT ASSESSMENT MANDATED BY THE EMA

Another key innovation established in the EMA is an environmental impact assessment (EIA) process that covers all environmental sectors. If biodiversity is to receive protection, the fact that it may be affected by particular development activity must be brought to light in advance, while planning is occurring, and alternatives are still open. This is the heart and soul of environmental impact assessment theory. Thus, adoption of this process across the full range of sectors in Malawi, not simply parks and wildlife,<sup>134</sup> should

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<sup>124</sup> U.S.-Malawi Agreement, *supra* note 122, at 3.

<sup>125</sup> Environmental Management Act § 35 (1996).

<sup>126</sup> E.M.A. § 36 (1996).

<sup>127</sup> E.M.A. § 37 (1996).

<sup>128</sup> E.M.A. § 39 (1996).

<sup>129</sup> E.M.A. § 40 (1996).

<sup>130</sup> E.M.A. § 41 (1996).

<sup>131</sup> E.M.A. §§ 42-44 (1996).

<sup>132</sup> See *infra* note 172 and accompanying text.

<sup>133</sup> *Malawi Workplan*, *supra* note 113.

<sup>134</sup> The National Parks and Wildlife Act includes a wildlife impact assessment provision, NPA §§ 23-25 (1992).

offer significant opportunities to manage sustainably the country's remaining biodiversity.

In anticipation of passage of the Act, staff at MOREA drafted detailed guidelines to implement the imminent requirement for EIAs.<sup>135</sup> While it is the duty of the minister to establish in gazetted Guidelines<sup>136</sup> the kinds of projects that must undergo the process,<sup>137</sup> the Guidelines provide a list of likely types of projects whose developers will have to engage in environmental impact assessment.<sup>138</sup> Examples of projects that would be required to undergo an EIA include: large-scale irrigation or drainage schemes, logging schemes, construction of large-scale industrial plants, major roads and highways, refugee and resettlement schemes, and major resort facilities and hotels.<sup>139</sup>

It is clear from the tone and the language of the Guidelines that every attempt has been made to create a process that will integrate EIA with normal project planning so that it will not be viewed and will not become a bureaucratic obstacle to urgently needed economic development.<sup>140</sup> Indeed, Malawi desperately needs economic development to enhance its struggling economy. Sound development that avoids the mistakes made in other nations rushing to industrialize will provide the greatest benefit to entrepreneurs and citizens alike. It is well known that elsewhere, in the United States, for example, environmental regulation is regarded by developers and others as an obstacle to profit-making and progress. This perception is based on the fact that regulatory processes often delay implementation of development plans. Delays of several years are not unheard of when conflicts occur.<sup>141</sup>

According to staff in MOREA and the wording of the Guidelines, it seems that Malawi seeks to create an efficient and effective process which will avoid delays for projects that will not harm

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<sup>135</sup> Ministry of Research and Environmental Affairs, Administrative Guidelines for Environmental Impact Assessment in Malawi (Apr. 1996) [hereinafter Guidelines].

<sup>136</sup> "Gazetting," refers to the process of publishing in the Malawi Gazette, which is published by the Malawi Government Printing Office. Gazetting is required for any rule to become law.

<sup>137</sup> Environmental Management Act § 24 (1) (1996).

<sup>138</sup> Guidelines, *supra* note 135, Appendix B, "List of Prescribed Projects."

<sup>139</sup> *Id.*

<sup>140</sup> See e.g., Guidelines, *supra* note 135, at 4-5.

<sup>141</sup> Consider, for example, the case of Walt Disney Enterprises, Inc., which wished to construct a recreational area in the Mineral King Valley of the Sierra Nevada Mountains in California. Development planning began sometime in 1965. In a 1972 opinion, the U.S. Supreme Court ruled that the Sierra Club had standing to sue seeking reversal of government agency decisions authorizing the development. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

the environment.<sup>142</sup> Thus, an incentive to environmentally friendly development has been put in place. The spirit of the newly created process looks towards collaboration in project development, resulting in benefits for all stakeholders, rather than a blocking of development and increased economic activity.<sup>143</sup> MOREA staff wish to be seen as helpful cooperators working to facilitate environmentally sensitive economic development. For projects with significant environmental impacts, staff will work with entrepreneurs to identify more environmentally friendly development alternatives.<sup>144</sup>

As indicated in the text of the Guidelines, it is increasingly recognized that project level assessment may be a limited tool owing to its narrow focus on individual projects.<sup>145</sup> An individual project may be a part of an attempt to implement a policy, program or plan which is environmentally insensitive. Acknowledging this inherent weakness in the process, the Guidelines take the further step of suggesting that government engage in *strategic* environmental assessment (SEA) at the policy level to recognize the necessity for this kind of review at a planning level, prior in time to specific project development aimed at implementing policies, plans or programs.<sup>146</sup> SEA is not required by the EMA, but it seems to be a well conceived and justified addition to strengthen the process and its outcomes.

#### IX. NEXT STEPS: REVISED SECTORAL POLICIES, LEGISLATION AND INSTITUTIONAL ROLES, OMISSIONS

With passage of the EMA expected imminently, MOREA staff forged ahead to take the next steps contemplated by the Act and the NEAP. In June, 1996, as called for in the workplan for the environmental law and institutions project,<sup>147</sup> and under the auspices of USAID's NATURE Program,<sup>148</sup> MOREA organized a two-day workshop, bringing together representatives (the "environmental focal points") from nearly all of the government ministries most relevant to

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<sup>142</sup> Guidelines, *supra* note 135, at § 1.5.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at §§ 1.4-1.5.

<sup>145</sup> *Id.* at § 1.2.

<sup>146</sup> *Id.*

<sup>147</sup> Malawi Workplan, *supra* note 113.

<sup>148</sup> U.S.-Malawi Agreement, *supra* note 122.

the task of formulating and implementing environmental policy.<sup>149</sup> In advance of the meeting, detailed draft workplans were devised, outlining each ministry's schedule of activity to be pursued in the following several months.<sup>150</sup> The workplans were geared to result in new sector-specific policy, new legislation and a reconceptualization of institutional roles in light of the EMA, and on a time schedule that would satisfy the NATURE Program's requirements for the release of funding.<sup>151</sup> They were distributed en masse on the first morning of the workshop, and each ministry or department presented and took questions and comments on its plan over the two day period.<sup>152</sup>

The goals of the workshop included generating a better understanding among ministerial staff as to the content that was desired in their workplans, as well as developing a common procedural and substantive format under which all workplans would be rewritten and submitted within a few days' time.<sup>153</sup> The workshop had another very important benefit: certain significant misunderstandings or points of conflict were brought to light in the two days of discussion. For one, it was clear that many persons present operated through the narrow view of their sector and had not yet begun to develop the necessary multi-sectoral perspective needed to achieve the goals envisioned in the EMA.<sup>154</sup> They were not thinking about the ways in which their areas overlapped with other ministries and how they might beneficially collaborate with other government agencies to achieve shared goals.

Another clear point of divergence was what was jokingly referred to as "encroachment" of one ministry on the seemingly obvious territory of another ministry.<sup>155</sup> The representative from the Ministry of Lands, for instance, discussed the plans of his ministry to develop community participation projects for forest reserves and national parks. The representatives from those two departments, housed in the Ministry of Natural Resources, were quite surprised to learn of this plan and expressed a certain amount of jovial consternation. On a related issue,

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<sup>149</sup> Representatives participated from the Ministries of Agriculture and Livestock Development, Economic Planning and Development, Finance, Irrigation and Water Development, Lands and Valuation, and the Departments of Fisheries, Forestry, National Parks & Wildlife. The author had the good fortune to be invited to participate in the workshop. The descriptions and characterizations of the discussions are drawn from her notes and meeting handouts.

<sup>150</sup> Workshop documents: Workshop Programme 5th-7th June 1996; Review of NATURE Action Plans, 5th-7th June, 1996.

<sup>151</sup> See *supra* note 124 and accompanying text.

<sup>152</sup> See *supra* note 150.

<sup>153</sup> *Id.*

<sup>154</sup> See *supra* note 149.

<sup>155</sup> *Id.*

it was painfully clear that most present believed that the objective of community participation in management would be achieved through providing a single opportunity for the public to express its views. MOREA staff took note of this widely held perspective and began planning a subsequent workshop on the topic of community participation in natural resources management.<sup>156</sup>

At the workshop, Forestry Department staff reported that a draft revision of the 1964 Forestry Act,<sup>157</sup> initiated in 1993, was in the final stages of preparation and that they expected it to be introduced soon in the National Assembly.<sup>158</sup> The 1993 document, unlike the draft fisheries act, was formulated by a departmental committee without legal drafting expertise.<sup>159</sup> As one might expect from inexperienced statute drafters, the product was rough and contained a number of gaps. For example, it contained a prohibition of felling endangered tree species<sup>160</sup> but created no process through which it can be determined which species are endangered. It also revealed a narrow perspective on community involvement in management, giving local people a role in the management of village forests on customary land but not in forest reserves which contain a significant share of Malawi's forests.<sup>161</sup> It is anticipated that the community's role will be broadened in the 1997 rewrite.<sup>162</sup>

Some departments had been working on drafts to revise the legislation for their sector long before the NEAP process had run its course or the Environment Management Bill had been formulated. Before the 1992 Earth Summit, the Food and Agriculture Organization employed a consultant to draft new fisheries legislation to replace the 1974 Act. In June, 1994, the consultant issued his report, including an appendix containing the "Fisheries Conservation and Management Act 199".<sup>163</sup> As mentioned above,<sup>164</sup> the Fisheries Conservation and Management Act draft emphasizes planning to conserve Malawi's

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<sup>156</sup> *Id.*

<sup>157</sup> Forestry Act, Cap. 63:01 (1964).

<sup>158</sup> See *supra* note 149.

<sup>159</sup> Interview with Trevor Abbell, Research Head, Department of Forestry (June 16, 1994).

<sup>160</sup> Forestry Bill, § 69 (2) (1993).

<sup>161</sup> *Id.*

<sup>162</sup> Both the author and MOREA's attorney have been frustrated in attempts to secure copies of more recent drafts which are rumored to exist but cannot be located.

<sup>163</sup> MICHAEL C. LLOYD GAIGER, REPORT TO THE GOVERNMENT OF THE REPUBLIC OF MALAWI ON FISHERIES LEGISLATION, FOOD & AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (1994).

<sup>164</sup> See *supra* note 76.



critically important fisheries, which represents a step forward.<sup>165</sup> Even the title's inclusion of the words "conservation" and "management" indicates the change in direction. The draft apparently was developed, however, without a full understanding of the meaning of community participation in management, and before the GOM/USAID/UNDP coordinated effort to review all policies, laws and institutional roles.

It is worth noting that early drafts of both fisheries and forestry legislation included fledgling efforts at coordination among departments, such as allowing the officers of the other natural resources departments to enforce each others' laws,<sup>166</sup> and steps toward adopting a community participation approach through the creation of advisory boards that would contain public members.<sup>167</sup> After the passage of the EMA, a revision of the fisheries draft was completed. The revised Fisheries Bill passed in November of 1997<sup>168</sup> contains language that at least suggests that local fishing community participation is desired. A new provision, Part III, is entitled "Local Community Participation". Little detail is provided beyond permitting the Director of Fisheries to enter into "fisheries management agreements" with "Fisheries management authorities".<sup>169</sup> "Fisheries management authority" is defined as "any local community organization established for the purposes of promoting local participation in the conservation and management of fisheries in Malawi. This new provision, while not requiring co-management, at least sets up the statutory infrastructure to support its creation. Proponents of community involvement in fisheries management will undoubtedly view the language as inadequate, but one must bear in mind that this small step is in a new direction, perhaps explaining the apparent hesitancy. With Fisheries and Forestry Departments<sup>170</sup> leading the way, it is anticipated that the schedules

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<sup>165</sup> *Id.*

<sup>166</sup> The Fisheries Conservation and Management Act 199, draft, Section 4 (7) provides that forest officers and wildlife officers "shall be fisheries protection officers." Similarly, the draft Forest Act in Section 2 defines "forest officers" to include officers of the other two departments.

<sup>167</sup> Forestry Bill, 1993, § 16 (e) provides for "not less than three and not more than five members representing the general public appointed by the Minister." The Fisheries Conservation and Management Act 199, §§ 6(2)(d)-(f) provides for members from the fishing industry while (g) provides for five public members.

<sup>168</sup> Fisheries Conservation and Management Act (1997) (Malawi).

<sup>169</sup> *Id.* at §§ 7-9.

<sup>170</sup> A revised Forestry Bill was presented to the National Assembly and enacted in 1997. The new law takes preliminary steps toward co-management by declaring that "community involvement in conservation" is one of the Act's purposes. Forestry Act (1997) (Malawi). In Part II, the Director of Forestry is responsible for "promoting participatory forestry." *Id.* at § 5(d). The operative provisions of the new statute, however, fail to push co-management beyond permitting communities to establish "village natural resources management committees" which may choose

proposed by the other relevant departments will result in drafts of new policies and legislation in 1997.<sup>171</sup>

Not all of the pressing environmental problems in Malawi are currently on the legislative or other governmental agenda. For example, Malawi's considerable wetlands need and have yet to receive protection in national law.<sup>172</sup> A variety of significant wetland ecosystems, including the shoreline plains of the lakes,<sup>173</sup> will require protection as the pace of development quickens. Specific consideration of the importance of preserving wetlands could be addressed in some of the pending proposed legislation. It might well fit in the new version of the National Parks and Wildlife Act. The omission of national wetlands legislation suggests a failure to recognize fully the important roles played by wetlands.<sup>174</sup> For example, along with serving as nurseries for many of Malawi's fish species, its wetlands are home to a particularly rich array of birds.<sup>175</sup> Given the variety of natural resource sectors that could and should be involved in planning and policy design for wetlands protection, MOREA should initiate a collaborative effort in this regard involving Fisheries, National Parks and Wildlife, Forestry, Lands, and others. A detailed evaluation should be undertaken to canvass the status of the wetlands, allowing a determination as to whether additional areas should be declared as "protected" under the EMA or the National Parks and Wildlife Act, in addition to developing appropriate policies and statutes for their conservation.

A consultant hired by UNDP produced a comprehensive analysis of virtually all Malawi law related to environmental management.<sup>176</sup> His report identifies a number of other gaps in recently passed and proposed laws as well as legislation remaining to be

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to involve themselves in the management of forests on customary land. *Id.* at § 32(2)(b).

<sup>171</sup> Natural Resource Management and Environmental Support Program (NATURE), Workshop to Review Draft Sectoral Action Plan, workshop plans packet (1996).

<sup>172</sup> It should be noted that Malawi is a signatory to the International Convention on Wetlands of Significant Importance. *See supra* text accompanying note 2; *see also* NEAP, *supra* note 3 at 94. Regional planning for wetland protection is also ongoing. SADCC, Food and Natural Resources, Workshop report, Jan. 31-Feb. 2, 1990, at sec. 3, p. 19, describing a preparatory mission to establish a project to coordinate SADCC region wetlands protection with the International Convention on Wetlands.

<sup>173</sup> For a discussion of the need for wetlands policy, *see* F.X. MKANDA, AN OUTLINE MANAGEMENT STRATEGY FOR WETLANDS CONSERVATION AND MANAGEMENT IN MALAWI, Summary of a paper presented at the Malawi Wetlands Seminar, IUCN-ROSA, November, 1992, SADC Natural Resources Newsletter, No. 4, October 1993, at 18-19.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Gracian Banda, Reform of Environmental Legislation in Malawi: Determining the Scope and Need for Sectoral Reviews, final draft, December, 1996.

developed. Presumably, this document will be used as a basis for additional legislation in the near future given the government's and donors' continuing strong interest in this area.

## X. CONCLUSION

With the strong support of USAID, the World Bank, UNDP, and other donors, the Government of Malawi has undertaken an ambitious program of environmental policy revision at the conclusion of which it will replace decades-old statutes with new laws and rules aimed to guide the country to the path of sustainable development. If fully implemented, the new policies, laws, and institutional arrangements should assist in the sustainable management of the country's rich biological and genetic diversity. In a country of extremely scarce resources, the progress to date in this area has been remarkable. Since the Earth Summit in 1992, Malawi has formulated a detailed environmental action plan and moved the environmental agency from departmental to ministry status.

An overarching framework for environmental management law has been enacted that, while not all that its proponents would wish it to be, should bring about substantial progress towards sustainable development and biodiversity management. Progress will occur through an ongoing process of environmental management planning development at local and national levels, leading to policy development, and ultimately resulting in legislative reformulation. It is hoped that the new Ministry of Research and Environmental Affairs, under the new framework law, will increase sufficiently in staff and political power to permit it to coordinate broadly throughout the government, to manage the national environmental impact assessment process, and to monitor environmental sustainability progress to allow it to propose adjustments as needed.<sup>177</sup>

Malawi's progress should serve as a model to other countries. The effectiveness of the multiple efforts now underway should be carefully monitored in the future. Given the country's large population, in relation to the size of its arable land, the extreme poverty of most of the population, and the daunting array of environmental problems,

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<sup>177</sup> Since the initial drafting of this article, MOREA regrettably was transformed in July of 1997 from a ministry to a departmental organization. Titled the Department of Research and Environmental Affairs, it is housed within the Ministry of Forestry, Fisheries and Environmental Affairs. As a department its leadership and coordinating tasks will prove more challenging but not, it is hoped, impossible.

success in this challenged land will be a model of hope for the world.

